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IN THE

Supreme Court of the United States

OCTOBER TERM 1947

HENRY LUSTIG, E. ALLAN LUSTIG and JOSEPH SOBEL,

Petitioners,

against

UNITED STATES OF AMERICA,

Respondent.

**PETITION FOR WRIT OF CERTIORARI TO THE
UNITED STATES CIRCUIT COURT OF APPEALS
FOR THE SECOND CIRCUIT AND BRIEF IN
SUPPORT THEREOF**

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*To the Honorable, the Chief Justice of the United States,
and the Associate Justices of the Supreme Court of the
United States:*

Your Petitioners pray that a writ of certiorari be issued to the Circuit Court of Appeals for the Second Circuit to review a judgment of that Court entered July 21, 1947, affirming a judgment of conviction and sentence of the District Court for the Southern District of New York, entered July 10, 1946, on the verdict of a jury (R. 1915).

Jurisdiction

The jurisdiction of this Court is invoked under Section 240(a) of the Judicial Code, as amended by the Act of February 13, 1925 [28 U. S. C. A., Sec. 347(a)].

Opinions Below

No opinion was rendered by the District Court. The opinion of the Circuit Court of Appeals, not yet reported, appears at the end of the record (R. 2193-2201).

Statutes Involved

Section 248, Revised Statutes (Sec. 242, Title 5, U. S. C.), provides, among other things, that the Secretary of the Treasury "shall superintend the collection of the revenue".

Section 3901, subdiv. (a)(1), Internal Revenue Code (Title 26, U. S. C.), provides that the Commissioner of Internal Revenue, under the direction of the Secretary, "shall have general superintendence of the assessment and collection of all taxes imposed by any law providing internal revenue".

Section 376, Revised Statutes as amended (Sec. 326, Title 5, U. S. C.), provides:

"The General Counsel for the Department of the Treasury, under the direction of the Secretary of the Treasury, shall take cognizance of all frauds or attempted frauds upon the revenue, and shall exercise a general supervision over the measures for their prevention and detection, and for the prosecution of persons charged with the commission thereof."

Section 3761, Internal Revenue Code (Title 26, U. S. C.), provides:

"(a) *Authorization.* The Commissioner, with the approval of the Secretary, or of the Under Secretary of the Treasury, or of an Assistant Secretary of the Treasury, may compromise any civil or criminal case arising under the internal revenue laws prior to reference to the Department of Justice for prosecution

or defense; and the Attorney General may compromise any such case after reference to the Department of Justice for prosecution or defense.

"(b) *Record.* Whenever a compromise is made by the Commissioner in any case there shall be placed on file in the office of the Commissioner the opinion of the General Counsel for the Department of the Treasury, or of the officer acting as such, with his reasons therefor, with a statement of—

"(1) The amount of tax assessed,

"(2) The amount of additional tax or penalty imposed by law in consequence of the neglect or delinquency of the person against whom the tax is assessed, and

"(3) The amount actually paid in accordance with the terms of the compromise."

Section 5 of Executive Order No. 6166 of June 10, 1933 (printed after Sec. 132, Title 5, U. S. C. A., and authorized by Chap. 212, Sec. 403 of the Act of March 3, 1933, 47 Stat. 1518) provides:

"The functions of prosecuting in the courts of the United States claims and demands by, and offenses against, the Government of the United States, and of defending claims and demands against the Government, and of supervising the work of United States attorneys, marshals, and clerks in connection therewith, now exercised by any agency or officer, are transferred to the Department of Justice.

"As to any case referred to the Department of Justice for prosecution or defense in the courts, the function of decision whether and in what manner to prosecute, or to defend, or to compromise, or to appeal, or to abandon prosecution or defense, now exercised by any agency or officer, is transferred to the Department of Justice.

"For the exercise of such of his functions as are not transferred to the Department of Justice by the foregoing two paragraphs, the Solicitor of the Treasury is transferred from the Department of Justice to the Treasury Department.

"Nothing in this section shall be construed to affect the function of any agency or officer with respect to cases at any stage prior to reference to the Department of Justice for prosecution or defense."

Questions Presented

1. Does the United States Treasury Department have the power to grant immunity from criminal prosecution to delinquent taxpayers who make a voluntary disclosure before investigation without actually making a compromise agreement, such power having been exercised without challenge since long before 1934 for the purpose of enabling the Treasury Department to collect unpaid taxes from such taxpayers?
2. Even if the promise of immunity was *ultra vires*, was it a denial of due process and a violation of the Petitioners' constitutional immunity from self-incrimination to use to convict them evidence obtained as a part of a confession knowingly induced by the Treasury Department's promise of immunity?
3. Was the question whether the Petitioners had made a voluntary disclosure before investigation improperly withdrawn from the jury on the ground that the Treasury Department was not bound by its promise of immunity?
4. Should the jury have been permitted to consider whether the Petitioners' confession was voluntary in order to determine what consideration should be given to evidence disclosed in, and obtained as part of, a confession induced by an official promise of immunity?
5. Did the decision by the Circuit Court of Appeals of a disputed question of fact on post-trial "findings and the evidence which the Trial Judge credited" (R. 2197) cure the error in withdrawing from the jury the question

whether the Petitioners made a voluntary disclosure before investigation?

6. Did the Circuit Court of Appeals properly decide that there had been no denial of due process and no violation of the Petitioners' immunity from self-incrimination for the stated reason that the Petitioners' confession was not induced by the Treasury Department promise of immunity because an investigation was begun before the confession was made?

7. Was there such a departure from the usual course of judicial procedure in the instant case as to call for the exercise by this Court of its power of supervision?

Statement

1. The Proceedings.

The indictment charged in twenty-three counts that the Petitioners, who were respectively the President and sole owner, the Manager and the Chief Accountant of seven corporations, had participated in attempts to evade payment of income taxes by filing false returns for each of said corporations for the tax years 1940 to 1944, inclusive, with intent to defraud the revenue, and that they had conspired to do so (R. 11-57).

Pre-trial orders were made by the District Court striking out pleas in abatement and denying a motion to dismiss the indictment for the reason, among others, that the claim of immunity was matter of defense for the trial (R. 86, 87, 92, 93).

A pre-trial order was also made denying a motion for the suppression and return of evidence, with leave to renew at the trial (R. 158, 159, 160). It was renewed at the opening; and an understanding was reached between Court and counsel that the Government's evidence, subject to the motion, should be received subject to a continuing objection and a motion to strike under the Fourth and

Fifth Amendments, and if the motion should be denied, that the question involved should be submitted to the jury under the general issue if the law permitted (R. 233-234).

There was no denial of the tax frauds charged (R. 1758). The sole issues litigated were whether the Petitioners had made a voluntary disclosure before investigation in reliance on the immunity promised by the Treasury Department in its promulgation of its disclosure policy, and whether, if the Treasury promise was *ultra vires*, the use of the evidence disclosed by their confession to convict them was a denial of due process and a violation of their immunity from self-incrimination.

But the Court withdrew those issues from the jury. It charged that, even though there was a voluntary disclosure before investigation in reliance on the Treasury policy, the Treasury Department was not bound by its promise for the reason that it had no power to make it and could not grant immunity except by a formal compromise agreement (R. 1864-1869).

The Court refused to charge that evidence obtained in a confession induced by the promise not to recommend a criminal prosecution, and the assurance of immunity by the Collector of Internal Revenue to whom disclosure was made, could not be considered by the jury, to which refusal exception was taken (R. 1831, 1884). After the evidence was closed, it said that it would submit that question to the jury (R. 1690), but later decided not to do so, its decision being prompted, so it said, "very largely by the fact that it may work harm to the defendants" if mentioned (R. 1841, f. 5523).

Exception was also taken to the charge on the subject of voluntary disclosure (R. 1883, 1887).

Although the sole issue submitted to the jury, whether the Petitioners had participated in the filing of false tax returns with intent to defraud the revenue, was not contested, the jury in reporting the verdict of guilty, thus virtually directed by the Court, recommended clemency (R. 1897).

After the verdict the Trial Court found the facts on the contested issues in favor of the Government, though it had refused to submit them to the jury, and on those findings entered an order denying the motion for the suppression and return of evidence (R. 2170-2181), which motion had as a practical matter become wholly *functus* by the denial of the motion to strike. An appeal was taken from that order and consolidated with the appeal from the judgment (R. 2182-2187).

2. The Treasury Policy.

The Trial Court found as follows:

"At all times between 1934 and the date of the trial of this cause the Treasury Department of the United States had a settled policy to the effect that any taxpayer, even one guilty of fraud, who voluntarily disclosed wrongdoing to the Treasury Department prior to investigation would not be prosecuted. This policy was publicized by various important Treasury officials during the period mentioned" (R. 2171).

That policy long antedated 1934 (R. 1059).

Mr. John P. Wenchel, long Chief Counsel for the Internal Revenue Bureau, a Government witness, testified that there can be no prosecution of a tax fraud case without a Treasury Department recommendation (R. 1562-1563), that the voluntary disclosure policy is to encourage disclosure prior to investigation (R. 1561), that in such cases there is no need and it is not the practice to enter into compromise agreements, but that on the mere making of a voluntary disclosure, prior to any subsequent action by the Treasury Department, the taxpayer secures immunity from prosecution "the minute he comes in" and "there may never be a compromise record written up if the full tax is paid" (R. 1559, 1560).

Speaking to the public for the Treasury Department, Secretary Vinson said that under the Treasury Department policy even the willful evader secures immunity from

a criminal prosecution by a voluntary disclosure before an investigation "is under way" and that there is nothing complicated in going to the Collector of Internal Revenue and simply saying, "There is something wrong with my return and I want to straighten it out" (Ex. II, R. 2127, printed at R. 139, offered at R. 898).

Mr. Jackson, then Assistant General Counsel of the Treasury Department, said in 1934, in substance and effect, that it had theretofore been the practice of the Treasury Department under its disclosure policy to excuse from criminal prosecution taxpayers troubled by conscience or the activities of Revenue Agents who made voluntary disclosure and that "Confessions are still heard but penance is more fitting the offense" since thenceforth the Treasury Department would insist upon payment of the full civil penalties, though continuing to forego criminal prosecution (Ex. MM, R. 2129, offered at R. 1043).

Attorney General Olney had ruled as far back as 1893 that the Treasury Department had exclusive jurisdiction of tax fraud cases at all stages even including the giving of directions to United States District Attorneys for their prosecution (20 Op. Atty. Gen. 715).

Prior to the Executive Order of June 10, 1933, the power to grant immunity to delinquent taxpayers for making a voluntary disclosure before investigation was exercised by the Treasury Department under its authority over the collection of the revenues and its exclusive jurisdiction to prosecute tax fraud cases, obviously conferred upon it as an aid to the collection of the revenues.

It will be seen that by the Executive Order (p. 3, *ante*) the function of prosecuting and of supervising the work of United States Attorneys in tax fraud cases was transferred from the Treasury Department to the Department of Justice, and thus for the first time the latter Department acquired jurisdiction to prosecute such cases.

By the second paragraph of the Order "the function of decision whether * * * to prosecute * * *" such cases was also transferred to the Department of Justice from

the Treasury Department, *but only after a reference of the case by the Treasury Department*; and that function of decision whether to prosecute was reserved to the Treasury Department prior to such reference by the third and fourth paragraphs of the Order.

Since 1933 the Treasury Department has exercised its power to grant immunity under its retained function of decision, prior to reference of a case, whether to prosecute, and its sole power to refer it for prosecution. The Department of Justice has no jurisdiction to prosecute tax fraud cases until the Treasury Department has, in performance of this function, made its own decision to prosecute and has referred the case for prosecution.

The subsequent revisions of said Section 376 of the Revised Statutes and Section 3761 of the Internal Revenue Code confirm that construction, since they in no way limited the power thus publicly exercised.

Indeed, the power to grant immunity from a criminal prosecution is incidental to and a part of the greater power to compromise "any civil or criminal case arising under the internal revenue laws", conferred on the Treasury Department prior to a reference and on the Department of Justice thereafter by said Section 3761 as amended by the Act of 1938 (Sec. 3761, Title 26, U. S. C.; Rev. Stat., Sec. 3229; Revenue Act of 1938, Sec. 815).

Since 1863 the Treasury Department has had general supervision over the measures for the prevention, detection and prosecution of tax frauds (Act of March 3, 1863, C. 76, Sec. 2, 12 Stat. 739; Rev. Stat., Sec. 376).

Since 1868 it has had the power to compromise either civil or criminal liability, or both (Act of July 20, 1868, C. 186, Sec. 102, 15 Stat. 125, 166; see Act of July 13, 1866, C. 184, 14 Stat. 98, 145, 146).

Since June 10, 1933, it has had the power of decision prior to a reference whether to prosecute a tax fraud case, which it had exercised at all stages before 1933.

It has the sole power to refer a case to the Department of Justice for prosecution.

3. The Disclosure.

The Petitioner Henry Lustig instructed the Petitioner E. Allan Lustig to redeposit in the banks something over \$1,800,000 in currency that had been accumulated in a bank vault, and to make disclosure to the Collector of Internal Revenue for the District, saying that he had been advised that there would be no criminal aspects of the matter if there was a disclosure before investigation (R. 1084, 1179, 1221).

The bank deposits were made as directed in different banks between February 27 and March 28, 1945 (R. 1089, 1091, Exs. B-I, R. 2102-2108, offered at R. 555-562), and on March 26th disclosure was made to Collector Pedrick by the Petitioner E. Allan Lustig; and the Collector assured him that that removed the criminal aspects of the case and made it a civil case (R. 1109-1110). That is disputed, but is corroborated by credible witnesses and documentary evidence (R. 1284, 1298; Defts.' Ex. SS, R. 2140, offered at R. 1106).

Post-trial Finding 23 says that the Petitioners knew that the redeposits would lead to the discovery of the tax frauds (R. 2178). But the Government contends that, having made the deposits in March with that knowledge, the Petitioners waited until April 25th to make any disclosure at all, at the risk of a Treasury Department investigation being started before disclosure; although the deposits were the first steps taken to carry out the decision to make disclosure.

As soon as the Petitioner Sobel had completed his computations of the understatements of income of the seven corporations for the five tax years in question, upon which the Collector was advised on March 26th he was engaged (R. 1110), and on April 25, 1945, formal disclosure letters for each of the seven corporations were prepared and presented to Collector Pedrick. Sobel's summaries of the tax deficiencies (Defts.' Ex. CC, R. 2125, offered at R. 736) were also submitted to him (C. C. A. Opinion, R. 2197).

The letters stated that there had been understatements of income, requested an examination of the books, and tendered cooperation and all the assistance necessary to enable the Treasury Department to determine the amount of tax deficiency (Exs. BB 1-7, R. 2123-2125, offered at R. 733, similar to Ex. D, R. 134).

Mr. Pedrick admits that he received the letters, and he referred them to the appropriate official to take charge of the examination requested. He does not claim that he raised any question as to their timeliness (R. 1428-1429). In due course they reached the Agent-in-Charge of examinations, Mr. Krigbaum, who on April 28, 1945, delivered them to Examiner Diehl to conduct the examination requested (R. 732-734, 934-941). Diehl began that examination at the offices of the taxpayers, which were made available to him, on May 14, 1945 (R. 702). Krigbaum was not called as a witness, but Diehl admits that on April 28th, when the letters were turned over to him, he first learned from the Petitioners' representative that the corporations' income had been understated by means of overstatements of purchases and understatements of sales (R. 755-756, 788), that when he began the examination on May 14th he was furnished Sobel's summaries of the understatements of income (Ex. CC, R. 741), that as he reached each corporation in turn Sobel gave him a statement or memorandum relating to that corporation (obviously Sobel's work-sheets (R. 794, Ex. KK, R. 2128, offered at R. 1026)), that as he desired any book, paper or record in the course of his examination it was promptly produced and fully explained (R. 791-793), that every explanation requested was given and found in each instance to be correct (R. 794), that the Petitioners instructed their employees to give him and his assistants whatever information they requested (R. 801-803) and that his computations of the understatements of income (Govt.'s Ex. 306, R. 2026, offered at R. 703) substantially agreed with Sobel's (Defts.' Ex. CC), and that with minor, insignificant exceptions the different items were identical (R. 743-758).

There is no denial that Diehl's examination was solely under and pursuant to the disclosure letters of April 25th. There is no claim that any demand was ever made for the production of the books or that any statutory authority of the Treasury Department was ever invoked to procure them.

The indictment charges corporate tax frauds only. There is no claim that any investigating officer or examiner was ever given or ever asked the Collector of Internal Revenue for the corporate tax returns in connection with or for the purpose of any tax fraud investigation.

4. The Alleged Investigation by the Treasury Department.

There is no pretense that any Treasury Department official, agent or examiner ever made or attempted to make any examination or investigation of the corporate tax frauds charged in the indictment, except the examination made by Diehl under and pursuant to the request of the disclosure letters of April 25, 1945, nor any suggestion that any demand was ever made by Treasury Agents for the production of the corporate books, or that any of the statutory powers of examination of the Treasury Department were ever invoked, or that there was ever any occasion to invoke such powers.

The Petitioners knew, as found by the District Court as above, when the bank deposits were made that they would be reported to the Treasury Department. They were so reported by the Federal Reserve Bank of New York and on March 24, 1945, a copy of that report was sent by the Chief of the Intelligence Unit to Agent McQuil-lan in New York with a transmittal memorandum (Ex. 333, R. 2076, offered at R. 1344). The memorandum (Govt.'s Ex. 333) did not suggest, much less direct, a tax fraud investigation. At most, it suggested an inquiry into the fact of the reported deposits which the Petitioners knew would be reported when they were made, as above. However, the Circuit Court of Appeals found from post-trial

"findings and evidence which the Trial Judge credited that the investigation began at the latest on March 24, 1945" (R. 2197).

McQuillan and his sub-agents made inquiries at the Federal Reserve Bank and at some of the depository banks and confirmed the fact of the deposits, as shown by McQuillan's reports to his Chief (Ex. 335, R. 2082, offered at R. 1349; Ex. 336, R. 2086, offered at R. 1349; Ex. 337, R. 2087, offered at R. 1354). That was the only investigation ever made by them, as shown by said exhibits. McQuillan did on March 27th address a letter of inquiry to Collector Pedrick asking for certain information relative to the filing of tax returns by Henry Lustig and three of the corporate taxpayers (Govt.'s Ex. 334, R. 2080, offered at R. 1347).

According to the testimony of E. Allan Lustig, as above, that was after he had made disclosure to Collector Pedrick, which the latter informed him was sufficient to remove the criminal aspects of the case and make it a civil case.

That letter of inquiry was not answered until June 1st (Defts.' Ex. JJJ, R. 2158, offered at R. 1375). In the meantime, the April 25th disclosure letters had been delivered to Collector Pedrick and pursuant to them Examiner Diehl had begun the requested examination of the corporate books and records at the offices of the taxpayers on May 14, 1945 (R. 707); and on May 24th Secretary Morgenthau had made the public announcement stated below (p. 14).

Commissioner Nunan, who referred the case to the Department of Justice for a criminal prosecution on August 15, 1945, never claimed that the investigation of the corporate tax frauds charged was begun by Exhibit 333, or that there was ever any such investigation except that conducted by Examiner Diehl, but put his decision on an entirely different ground, as stated later (p. 14). In fact, no other investigation was ever started or ever got "under way", to use the words of Secretary Vinson quoted at page 8, *ante*. Certainly, the contrary could not be decided as matter of law.

5. The Reference of the Case to the Department of Justice for a Criminal Prosecution.

On May 24th, ten days after Diehl's examination of the books began, Secretary Morgenthau stated in a press conference that Treasury Agents had discovered serious tax evasions by a restaurant chain, that a lawyer had made a so-called disclosure, but that the Treasury Department was going to prosecute the case "to the hilt". "We are going to do something in this case we never did before" (R. 956-959).

Mr. Oestreicher, the Petitioners' tax representative, testified that the next morning the Treasury Agents conducting the examination at the offices of the taxpayers admitted that they had discovered nothing not disclosed to them and evinced surprise at the Secretary's statement (R. 956-957); and none of them, though in court, took the stand to deny that testimony.

Two weeks later, Mr. Nunan, the Commissioner of Internal Revenue, wrote Mr. Oestreicher that he had no doubt that the disclosure was not voluntary and that the Secretary agreed with him (Ex. 327, R. 2046, offered at R. 1243).

On August 15th he referred the case to the Department of Justice for criminal prosecution and explained his action by saying that the disclosure was not voluntary because of a "tip-off" eight or nine days before April 25th (R. 1247). He did not take the stand to explain the grounds of his action and there is no pretense that he ever claimed that any investigation of the corporate tax frauds was under way when disclosure was made.

The Decision of the Circuit Court of Appeals

The Circuit Court of Appeals decided:

1. "The compromise statute affords no shield to one who has violated the tax laws unless there has actually been a compromise. * * * There was no issue of fact for

court or jury as to whether a contract of compromise had been made. Accordingly there is no merit in the defense of immunity" (R. 2199-2200), and

2. The constitutional question of due process and immunity from self-incrimination was "one of the admissibility of evidence" (R. 2198), and the observation of this Court in *Wilson v. U. S.* (162 U. S. 613, 624) was *dictum* and "at most indicates that the question of admissibility may be left to the jury, not that it must" (R. 2199).

The Circuit Court of Appeals enumerated a number of facts found by the Trial Court and said: "It appears from what we have already said that there was no disclosure of tax deficiencies until April 25, 1945, * * *. We think it clear from the findings and the evidence which the Trial Judge credited that the investigation began at the latest on March 24, 1945" (R. 2197-2198).

It also said: "The correctness of the findings of fact objected to depended, so far as not already discussed, upon conflicting testimony or inferences therefrom" (R. 2200-2201).

Assignments of Error

1. The District Court erred in withdrawing the immunity issue from the jury on the ground that the Treasury Department was not bound by its promise (f. 5594; Exception, f. 5647).

2. The District Court erred in refusing to charge the Petitioners' request No. 25 (ff. 5491-5493; Exception, f. 5656).

3. Having withdrawn the only contested issues from the jury on rulings of law, the District Court erred in attempting after the trial to resolve disputes of fact which were for the jury (R. 2170-2179).

4. Both the Courts below erred in holding that a delinquent taxpayer could secure immunity from a criminal prosecution only by actually entering into a compromise agreement with the Treasury Department (R. 1868, 2199-2200).

5. The Circuit Court of Appeals erred in summarily deciding the question of due process and self-incrimination as a question "of the admissibility of evidence" (R. 2198).

6. The Circuit Court of Appeals erred in summarily disposing of the questions of immunity, due process and self-incrimination as illusory.

7. The Circuit Court of Appeals erred in finding that the investigation of the corporate tax frauds charged in the indictment was begun on March 24, 1945. It was for the jury to say when the investigation was begun, if ever.

8. The Circuit Court of Appeals erred in finding, also on sharply conflicting evidence, that no disclosure was made prior to April 25, 1945. That was a question for the jury.

Reasons for Granting the Writ

1. The instant case involves a federal question of the utmost public importance, which has not been, but should be, decided by this Court, namely, whether the United States Treasury Department has the power, which it has exercised since long prior to 1933, to grant immunity from criminal prosecution to delinquent taxpayers for making a voluntary disclosure before investigation, in order to enable the Treasury Department to collect unpaid taxes, without actually making a compromise agreement with the taxpayer.

2. The decision of the Circuit Court of Appeals of the important constitutional questions of due process and immunity from self-incrimination under the Fifth Amendment is in conflict with the applicable decisions of this Court.

See:

Boyd v. U. S., 116 U. S. 616, 633.

Bram v. U. S., 168 U. S. 532.

Gouled v. U. S., 255 U. S. 298.

Wan v. U. S., 266 U. S. 1, 15.

Olmstead v. U. S., 277 U. S. 438, 458, and see dissenting opinion 469-488.

McNabb v. U. S., 318 U. S. 332, 339.

Ashcraft v. Tennessee, 322 U. S. 143.

Lyons v. Oklahoma, 322 U. S. 596, 602.

Malinski v. New York, 324 U. S. 401.

3. In deciding that the question of due process and self-incrimination was merely a question of the admissibility of evidence for the Court to decide, the Circuit Court of Appeals decided an important federal question contrary to the applicable decisions of this Court, and its decision is in conflict with the decisions of other Circuit Courts of Appeals.

Wilson v. U. S., 162 U. S. 613, 624.

Kent v. Porto Rico, 207 U. S. 113, 119.

Wan v. U. S., 266 U. S. 1, 16.

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Denny v. U. S. (C. C. A. 4), 151 F. 2d 828, 833-834.

McAffee v. U. S. (App. D. C.), 105 F. 2d 21, 25-27.

4. The Circuit Court of Appeals sanctioned such a departure by the District Court from the usual course of judicial procedure as to call for the exercise of this Court's power of supervision.

McNabb v. U. S., 318 U. S. 332, 339.

WHEREFORE, it is respectfully submitted that a writ of certiorari to the Circuit Court of Appeals for the Second Circuit should be issued as prayed for.

Respectfully submitted,

HENRY LUSTIG,
E. ALLAN LUSTIG and
JOSEPH SOBEL,
Petitioners,

by
NATHAN L. MILLER,
J. BERTRAM WEGMAN,
Attorneys for Petitioners.

IN THE

Supreme Court of the United States

OCTOBER TERM 1947

HENRY LUSTIG, E. ALLAN LUSTIG and JOSEPH SOBEL,
Petitioners,
against

UNITED STATES OF AMERICA,
Respondent.

**BRIEF IN SUPPORT OF PETITION FOR A WRIT
OF CERTIORARI**

The Petitioners maintain:

1. The Treasury Department had the power to make and perform its promise that delinquent taxpayers would secure immunity from criminal prosecution by making a voluntary disclosure before a Treasury investigation was "under way", which power has been exercised without challenge for more than twenty years and continues to be exercised to the present time.

2. It was for the jury to decide the admitted dispute of fact whether a voluntary disclosure was made before any Treasury Department investigation was under way, and the Courts below usurped the function of the jury in deciding that question post-trial.

3. If the Treasury Department promise was *ultra vires*, it was a denial of due process and a violation of the Petitioners' immunity from self-incrimination to use to convict them the evidence disclosed in reliance upon the promise of immunity, even though an investigation was under way when disclosure was made.

4. The jury was not permitted to decide, and the District Court did not undertake to decide, whether the Petitioners were induced by the Treasury Department promise to make their confession and disclosure, and whilst the Circuit Court of Appeals held that that was merely a question of the admissibility of evidence for the Court finally to decide, it found that the Petitioners were not induced by the Treasury Department promise to make disclosure, and based its finding on the erroneous ground that a Treasury Department investigation had already begun, without considering the determinative facts.

5. As a result of the unusual and improper course of procedure followed and sanctioned by the Circuit Court of Appeals, the Petitioners have been denied their conceded right to a jury trial of the issue of immunity, if the Treasury Department had the power to make and perform its promise of immunity, and the question whether their constitutional rights were invaded has never been decided on the determinative facts either by the Court or jury.

POINT I

The United States Treasury Department should welcome an authoritative decision of the question whether it has the power, without actually entering into formal compromise agreements, to grant immunity from criminal prosecution to delinquent taxpayers who make voluntary disclosures before investigation—a power which it has exercised without challenge since long before 1933.

The question is squarely presented in the instant case—

(1) By the decision of the Circuit Court of Appeals that “the compromise statute affords no shield to one who has violated the tax laws unless there has actually been a compromise”, and that there having been no actual compromise agreement “there is no merit in the defense of immunity”; and

(2) By the decision by the Court of disputed questions of fact which were plainly for the jury if the Trial Court and the Circuit Court of Appeals were in error on the question of law.

It is obvious that the decision of the Circuit Court of Appeals completely nullifies the disclosure policy of the Treasury Department since it cancels all assurances and leaves unreviewable the untrammelled decision of the Treasury Department to prosecute despite its promises. The making of a compromise agreement would have to depend on the result of a post-disclosure investigation, and such an uncertain “immunity” is not what was promised by the promulgated policy.

The Circuit Court of Appeals decided the question apparently without considering either the statutes quoted in the petition (p. 2) and the fact of their frequent revi-

sions during the period of the exercise of the power without in any way limiting it, or the Executive Order of June 10, 1933 (Petition, p. 3), which transferred the function of prosecution theretofore exercised by the Treasury Department in tax fraud cases to the Department of Justice, but expressly reserved in the Treasury Department the function of decision whether to prosecute, up to the very time of the reference of a case to the Department of Justice for prosecution.

It erroneously supposed that the question had been decided by this Court in *Botany Mills v. United States*, 278 U. S. 282, although that was a civil case involving the validity of an agreement of compromise of civil liability, lacking the concurrences required by the statute in such case, and the question of immunity from criminal prosecution under the Treasury Department disclosure policy was neither involved or considered.

For the convenience of the Court we append to this brief a copy of that part of the address of Mr. Wenchel, then Chief Counsel of the Bureau of Internal Revenue, relating to the "disclosure policy" of the Treasury Department, delivered before the Tax Executives Institute on May 14, 1947, and reported in the Commerce Clearing House Standard Federal Tax Reports for 1947, Vol. 4, par. 8697, which shows that the Treasury Department has continued to exercise the power, now for the first time challenged, down to the very time when this cause was *sub judice* in the Circuit Court of Appeals.

POINT II

The decision of the Circuit Court of Appeals that it was for the Trial Court finally to decide whether the Petitioners' confession was induced by the Treasury Department's promise of immunity conflicts with the applicable decisions of this Court. It also conflicts with decisions of other Circuit Courts of Appeals.

Of course, the Petitioners did not contend, as the Circuit Court of Appeals appears to have thought, that it was for the jury to decide whether the evidence objected to was admissible.

This Court said in *Wilson v. United States*, 162 U. S. 613, 624:

"When there is a conflict of evidence as to whether a confession is or is not voluntary, if the court decides that it is admissible, the question may be left to the jury with the direction that they should reject the confession if upon the whole evidence they are satisfied it was not the voluntary act of the defendant."

That may have been *dictum* in the sense that it was not necessary to the decision, as the Circuit Court of Appeals thought, but it was a considered statement of the rule as applicable to the Federal courts; and in support of it this Court cited decisions of the State courts plainly indicating that this Court did not consider that the Federal rule differed from the rule followed by most of the State courts.

It said in *Kent v. Porto Rico*, 207 U. S. 113, 118-119, referring to the submission of testimony "as to the voluntary nature of the confession" to the jury, "that this action of the court was proper, if there was conflict of testimony, is not open to controversy", citing *Wilson v. United States*, *supra*.

It held in *Wan v. United States*, 266 U. S. 1, 14-16, that "a confession obtained by compulsion must be excluded,

whatever may have been the character of the compulsion, and whether the compulsion was applied in a judicial proceeding or otherwise", citing *Bram v. United States*, 168 U. S. 532 (and, in a footnote, *Wilson v. U. S.* and *Kent v. Porto Rico*), and that the confession obtained in that case should have been excluded because "the undisputed facts showed that compulsion was applied. As to that matter there was no issue upon which the jury could properly have been required or permitted to pass." In the footnote there was cited, among others, *Boyd v. United States*, 116 U. S. 616; *Weeks v. United States*, 232 U. S. 383, 398; *Silverthorne Lumber Co. v. United States*, 251 U. S. 385, 392.

In *United States v. Murdock*, 284 U. S. 141, 150, it decided that the questions raised by a special plea of immunity under the Fifth Amendment "were mere matters of defense determinable under the general issue".

In *Lisenba v. California*, 314 U. S. 219, 236-238, this Court said that it had formulated the rules to govern in trials in the Federal courts involving questions of due process, citing in a footnote *Sparf and Hansen v. United States*, 156 U. S. 51, 55; *Wilson v. United States*, 162 U. S. 613, 622; *Bram v. United States*, 168 U. S. 532, and *Wan v. United States*, 266 U. S. 1, 14, and that "the aim of the requirement of due process is not to exclude presumptively false evidence, but to prevent fundamental unfairness in the use of evidence whether true or false".

In *Lyons v. Oklahoma*, 322 U. S. 596, 602, this Court said:

"When conceded facts exist which are irreconcilable with such mental freedom, regardless of the contrary conclusions of the triers of fact, whether judge or jury, this Court cannot avoid responsibility for such injustice by leaving the burden of adjudication solely in other hands. But where there is a dispute as to whether the acts which are charged to be coercive

actually occurred, or where different inferences may fairly be drawn from admitted facts, the trial judge and the jury are not only in a better position to appraise the truth or falsity of the defendant's assertions from the demeanor of the witnesses but the legal duty is upon them to make the decision." [Citing the *Lisenba* case.]

Yet the Circuit Court of Appeals said that on the question whether there had been a denial of due process and a violation of the Petitioners' immunity from self-incrimination, the only function of the jury was to pass on the probative value of the evidence (R. 2198-2199); in short, that the requirements of due process would be satisfied if the accused were convicted on a coerced confession which was truthful, though if false it would have to be disregarded by the jury.

Professor Wigmore and some of the State courts have taken the view that the Fifth Amendment does not forbid the use of out of court confessions or of evidence which comes from a coerced confession, but this Court has decided the contrary so often that it would be superfluous to cite the decisions.

If all that was said by this Court in the above cited cases were *dicta* it would still remain that it has never decided the contrary.

Steele v. United States, 267 U. S. 505, cited by the Circuit Court of Appeals, was a search and seizure case involving the question whether there was probable cause for the issuance of the warrant which was not in doubt and in fact was *res adjudicata*. That case can have no applicability to the question here.

The decision below also appears to conflict directly with the determination of the same question by other Circuit Courts of Appeals (see *Cohen v. U. S.* (C. C. A. 7), 291 Fed. 368, 369; *Denny v. U. S.* (C. C. A. 4), 151 F. 2d 828, 833-834; *McAffee v. U. S.* (App. D. C.), 105 F. 2d 21, 25-27).

POINT III

The decision of the questions of due process and self-incrimination by the Circuit Court of Appeals conflicts with the applicable decisions of this Court cited in the petition (p. 17) and was based on wholly erroneous grounds without any consideration of the determinative facts.

It held on the post-trial findings and the evidence credited by the Trial Judge "that the corporate records were in no sense the result of any promise of immunity. They were furnished long after the government investigation had begun" (R. 2198).*

It thus disposed of the constitutional questions under the Fifth Amendment and the issue of immunity upon the mistaken theory that precisely the same facts controlled both, overlooking the fact conceded by the Government that questions of fact on the issue of immunity were for the jury, and overlooking the further fact that on the question whether there had been a denial of due process and a violation of the Petitioners' constitutional privilege against self-incrimination, it was immaterial whether the confession was after the investigation had begun if that confession was induced by the Treasury Department's promise of immunity under circumstances, as here, where the officials knew that the Petitioners were acting in reliance on that promise, and the Petitioners were led to believe they would receive the benefits thereof.

There was thus no occasion for it to consider, and it apparently did not consider, the undisputed fact established, as the Trial Judge said, beyond the "shadow of doubt" (R. 1862), that the Treasury Department did have

* Incidentally, the notion of the Circuit Court of Appeals as to when the investigation is deemed to have been begun is quite different from the authoritative exposition by Mr. Wenchel, quoted in the appendix, *infra*, p. 35.

the widely publicized policy known as the "disclosure policy" and the further fact, established by uncontradicted evidence, and even by the testimony of the Government's own witness, Examiner Diehl, that the Petitioners had made a frank and complete disclosure even of the details of the understatements of income and of the method employed in the making of such understatements, together with the evidence thereof. Having ignored those two controlling facts, it naturally did not consider the connection between them.

The Circuit Court of Appeals stated that the information given the Treasury Department examiners and officials "could have been obtained by an examination of the books and records of the seven corporations and the records of the Federal Reserve Bank, even if the defendants had not submitted 'voluntary' statements" (R. 2195-2196), evidently thinking that to be material despite the undisputed fact that the information was not so obtained.

It said that Sobel's summaries of the tax deficiencies (Ex. CC) were submitted on April 25, 1945, to Collector Pedrick (R. 2197), thus disproving the post-trial finding to the effect that the April 25th disclosure was "belated and partial" (Finding 23, R. 2178). It disregarded the fact found by said post-trial finding that the Petitioners knew when the bank deposits were made that they would certainly lead to the discovery of the frauds. It thus wholly failed to consider the important and undisputed facts pertinent to the question whether the Petitioners' confession, unique for frankness and completeness, was induced by the Treasury Department's promise of immunity.

It apparently accepted the palpably erroneous view of the Trial Judge, the *ratio decidendi* of his decision as shown by said post-trial Finding 23, that the disclosure was solely induced by the bank deposits made from fear of some Government action respecting hoarded currency and by the knowledge that such deposits would lead to the discovery of the frauds.

Disclosures under the Treasury Department policy, as well as coerced confessions, are usually induced by hope or fear rather than a troubled conscience, and the important constitutional question of fact was whether the confession was induced by hope engendered by the Treasury Department's promise of immunity. The very fact of the fear of an investigation added to rather than detracted from the impelling force of the official promise of immunity.

The Kings Bench has ruled in *Rex v. Barker* (1941), 2 K. B. 381, that the books of the taxpayer produced as a part of the disclosure under a policy of the English Exchequer not unlike that of the United States Treasury Department were, because induced by the policy, not admissible against an accountant of the taxpayer who participated in the disclosure, even assuming that ordinarily evidence discovered as the result of an induced confession would be admissible in England though the confession itself would not be admissible. The books were held to be an integral part of the confession.

What, then, shall be said of our constitutional guarantees of due process and freedom from self-incrimination!

This Court has so zealously safeguarded the freedoms guaranteed by the Fifth Amendment, and especially the guarantee of due process, that even on a review of judgments of the State courts it makes an independent appraisal of the question whether there has been a violation of the due process clause of the Fourteenth Amendment.

Lisenba v. California, 314 U. S. 219.

Malinski v. New York, 324 U. S. 401.

And even apart from the constitutional questions, it exercises its plenary power of supervision to determine whether a Federal court has improperly admitted "incriminating statements from the defendants".

McNabb v. United States, 318 U. S. 332.

In the *Lisenba* case the Court said:

"Where the claim is that the prisoner's statement has been procured by such means"—i.e., by a denial of due process—"we are bound to make an independent examination of the record to determine the validity of the claim. The performance of this duty cannot be foreclosed by the finding of a court, or the verdict of a jury, or both" (314 U. S. 219, 237-8).

In the *Malinski* case the Trial Court had held a preliminary hearing on the voluntary character of the confession and, having admitted the evidence, charged the jury "that a confession should not be considered by them unless they found beyond a reasonable doubt that it was voluntary" (324 U. S. 401, 404). Yet this Court reversed the judgment of conviction on the ground that there had been a denial of due process.

Independently of whether that question should have been submitted to the jury in the instant case, it has been decided, as far as it has been decided at all either by the District Court or the Circuit Court of Appeals, on erroneous grounds without any consideration of the controlling facts, and as though it were immaterial that the Petitioners were deliberately induced, that the Treasury Department officials knew they were confessing because of and in reliance upon the Treasury Department's avowed and publicized policy, and the confessions were deliberately received on that basis.

POINT IV

There was such a departure from the usual course of judicial procedure in the instant case as to call for the exercise of this Court's power of supervision.

That the procedure was most unusual cannot be doubted.

A pre-trial order denied a motion for the suppression of evidence with leave to renew at the trial. It was renewed

at the opening. Decision of the motion was reserved on the understanding that the evidence should be received subject to objection and a motion to strike and, if the motion should be denied, the question involved should be submitted to the jury under the general issue if the law permitted (R. 234).

The law not only permitted but required the submission of the immunity issue, unless the widely publicized disclosure policy of the Treasury Department was without warrant of law.

However, the Trial Court held that the law did not permit the submission of that issue to the jury because said policy was without warrant of law.

Having thus disposed of the immunity issue at the trial on rulings of law, the Court undertook to dispose of it after the trial on findings of disputed questions of fact by deciding the motion to suppress evidence, which as a practical matter had become *functus* by the denial of the motion to strike.

The Circuit Court of Appeals has affirmed. Thus the Petitioners have been denied their constitutional right to a trial by jury of their defense of immunity, to which they were plainly entitled unless the courts below were right in holding that delinquent taxpayers cannot secure immunity from criminal prosecution under the Treasury Department's disclosure policy.

In this connection it may be noted that although the Circuit Court of Appeals at the outset of its opinion correctly stated the questions raised by Petitioners (R. 2195), when it came to discuss the second question (F. 2199-2200) that Court mistakenly treated the point as involving the Compromise statute, upon which the argument in nowise depended, and which it specifically disavowed.

At the conclusion of the evidence, the Trial Judge said that he would submit the confession issue to the jury as requested by the Petitioners' Request 25 (R. 1690). How-

ever, he later declined to do so, largely on the ground that it might harm the Petitioners to grant their request (R. 1840). He thought that he would be unable to make the jury understand that a disclosure could be voluntary under the Treasury Department policy but involuntary under the confession doctrine if induced by an official promise of immunity made without warrant of law.

The Circuit Court of Appeals has affirmed on the ground that whether there was a denial of due process and a violation of the Petitioners' immunity from self-incrimination involved merely a question of the admissibility of evidence, which was for the Court and not for the jury.

It held that the confession was not induced by the Treasury Department promise because made after the investigation had begun.

It treated the defense of immunity and the question whether the Petitioners were convicted on evidence which came from an improperly induced confession as identical and dependent on whether the evidence was furnished by them "after the government investigation had begun" (R. 2197-99). It ignored the established facts: (1) that the Treasury Department had long and widely publicized its promise of immunity from criminal prosecution to delinquent taxpayers who made voluntary disclosures before investigation; (2) that the letters of April 25, 1945 were submitted to and received by Collector Pedrick under that policy; (3) that Examiner Diehl's investigation was made pursuant to those letters, and (4) that it confirmed the frankness and completeness of the disclosure.

If the confession was induced by an official promise of immunity, it did not matter whether a Treasury Department investigation had already begun any more than it mattered whether the Treasury Department might have obtained the evidence by invoking its statutory powers, if there had been no confession.

Thus the question whether the Petitioners' constitutional rights were invaded by using the evidence, which was the substance of their confession, to convict them was not even decided by the District Court and was decided by the Circuit Court of Appeals on erroneous grounds without even considering the determinative facts.

Respectfully submitted,

NATHAN L. MILLER,
J. BERTRAM WEGMAN,
Attorneys for Petitioners.

RICHARD J. BURKE,
with them on the brief.

APPENDIX

TAX FRAUDS AND VOLUNTARY DISCLOSURES

[Par. 8697] *Address by Chief Counsel of Bureau.*—John P. Wenchel, Chief Counsel of the Bureau of Internal Revenue, in an address before the Tax Executives Institute annual dinner at the Waldorf-Astoria hotel in New York City on Wednesday, May 14, considered the subject, "Tax Fraud and Voluntary Disclosures." The full text* of the speech follows: * * *

Quite simply, attempted evasion is a disease, and a disease that has to be fought with strong remedies. That is why, once criminal fraud is discovered by our examining officers, the Federal Government is unbending and relentless. The law requires the prosecution of the tax-evader and that is what the Department recommends to the Attorney General.

There is one important exception to that. The Department has broad discretionary power long recognized by the Congress to determine the policy and procedure for the effective enforcement of the internal revenue laws. The Department, acting under that power, does not recommend prosecution of the evader who repents in time. There is nothing new in the position. For years the position of the Department has been that where the taxpayer makes a voluntary disclosure of intentional evasion before investigation has been initiated, criminal prosecution will not be recommended.

The Department has always encouraged voluntary disclosures.

And what is a voluntary disclosure? A voluntary disclosure occurs when a taxpayer of his own free will and accord, and before any investigation is initiated, discloses fraud upon the government.

Healthy administration of the internal revenue laws long ago dictated that policy, and I believe that its worth is obvious.

* Only the pertinent portions are here reprinted.

The making of a voluntary disclosure is a simple thing. The taxpayer or his legal agent can go before any official of the Bureau of Internal Revenue or any of its field offices—whether it is the Collector, a Deputy Collector, a Revenue Agent, a Special Agent, or any other responsible Treasury officer. There is no special form for making the disclosure. The simple statement that “I have filed false tax returns and I want to make the government whole,” would constitute a complete disclosure. Of course, it is usually best to present an amended return or other written document as evidence of the disclosure. If possible, the disclosure should be accompanied by payment of the tax which is known to be due, but this is not a prerequisite.

What kind of people make disclosures? They are all kinds. Some are people who are honestly repentant. Others are people who would rather sacrifice their ill-gotten gains than go to jail. Some are small people. Others are large corporations.

We had a good illustration recently in the midwest. A large produce concern, that had enriched itself on war contracts to help feed the army, came to see the light. It made a complete statement to our local officials and paid \$1,765,000 in taxes, interest and civil penalties in order to clear its record and to keep its officers out of jail.

We have had voluntary disclosures from black market meat and car dealers. We have had similar repentances from people in all walks of life. Of the \$3,000,000,000 collected from taxpayers within the past eighteen months as a result of the current drive against tax evaders, \$500,000,000 has been paid on voluntary disclosures.

Now we have said that in order to be considered voluntary, a disclosure must be made before we have initiated an investigation in the case. Therefore, it is essential that we define “the initiation of an investigation.”

The mere record of a name does not mean that an investigation has been initiated. The fact is that examining officers throughout the country have thousands of names or possible leads. To deny the existence of a voluntary disclosure merely because we have a name, would be com-

parable to regarding the telephone book as a dossier of tax evaders.

An investigation is initiated when a Special Agent, an Internal Revenue Agent, a Deputy Collector, or other Bureau officer, is assigned a return for examination, or where an investigating officer has requested advice of appropriate officers of the Bureau with respect to the filing of a return or the payment of taxes.

The time of disclosure and the time an investigation begins are, therefore, matters which can be ascertained with complete objectivity and certainty, thus protecting both the government and the taxpayer from decisions based on guesswork or other vague circumstances. To assure adherence to this principle, the Bureau stands ready at all times where a dispute may arise as to the time of a disclosure and the time an investigation was initiated to open its records in that regard.

We are not concerned with the motivating force behind an individual's deciding to come in and talk to us about his evasion. If he "gets religion" before we have done anything, he will not be prosecuted.

Before we leave this subject, let me make one thing clear. When we excuse a man from criminal prosecution because of his voluntary disclosure, we are not in any sense condoning his action. Nor are we letting anyone off easy. At the outset, I mentioned that there are two kinds of fraud, criminal and civil. Voluntary disclosure excuses a man from criminal punishment, but it does not excuse him from the civil penalties. Therefore, the public revenues and the public conscience are both protected by this policy.

In excusing the man from criminal prosecution, we are merely taking a sensible step to produce the revenue called for by law with the minimum cost of investigation. The man who makes a voluntary disclosure saves us a lot of money in investigating. In return, we can spare him a term in jail. This is good business from his standpoint and it is good business from the government's standpoint.

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IN THE
Supreme Court of the United States

OCTOBER TERM, 1947

No. 279

HENRY LUSTIG, E. ALLAN LUSTIG and JOSEPH SOBEL,
Petitioners,

v.

UNITED STATES OF AMERICA.

On Petition for a Writ of Certiorari to the United States
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PETITIONERS' REPLY BRIEF

NATHAN L. MILLER,

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PETITIONERS' REPLY BRIEF

The Petitioners do not seek a review of concurrent findings of fact by the lower Courts as the Government professes to suppose for want of any answer to the reasons for granting the writ stated in the petition.

They do seek a review of questions of law raised by the refusal of the Trial Court to submit the only contested questions of fact in a criminal case to the jury.

The Government does not deny the public importance of those questions or that they are precisely the type of questions which this Court will take up by certiorari. If the Trial Court erred in refusing to submit the disputes of fact to the jury, its error could not be cured by any post-trial findings.

The Government would substitute a Court's post-trial determination of disputed facts for the verdict of a jury in a criminal case.

The Circuit Court of Appeals decided:

(1) that "the compromise statute affords no shield to one who has violated the tax laws unless there has actually been a compromise. * * * There was no issue of fact for court or jury as to whether a contract of compromise had been made. Accordingly there is no merit in the defense of immunity" (R. 2199-2200). It did not decide that there was no issue of fact as to whether the disclosure preceded the investigation and was made under a promise of immunity. On that point it held—

(2) that "the question whether the disclosure preceded the investigation and was made under a promise of immunity * * * was one of the admissibility of evidence" (R. 2198), although the Government has never contended that the issue of immunity is not a jury question.

The opinion below thus holds that the Court alone, and not the jury, should pass upon evidence showing a promise of immunity and compliance by a defendant with its terms.

It said "The correctness of the findings of fact objected to depended, so far as not already discussed, upon conflicting testimony or inferences therefrom. The findings so far as material cannot be regarded as clearly erroneous" (R. 2200-2201).

Neither of the Courts below decided that there was no evidence to sustain the Petitioners' contentions. The District Court did not refuse for lack of evidence to submit to the jury the question whether there had been a disclosure before investigation in reliance on the Treasury policy, but, on the assumption that there had been such a disclosure, squarely ruled that the Treasury was not bound by its promise and, solely on that ground, declined to submit the only contested issue of fact to the jury (Petition, p. 6).

It did not refuse the requested charge, in respect of whether the Petitioners were induced to confess their wrongdoing by the promise of immunity, because that was a question for the Court, but because it feared the submission of the question to the jury might harm the Petitioners (*id.* p. 6).

Concurrent findings by the lower Courts of questions of fact after the trial could not cure errors in refusing to submit them to the jury. The Circuit Court of Appeals actually decided the case on questions of law as above, thus confirming the ruling of the Trial Court that the Treasury Department was not bound by its promise even though the Petitioners had made disclosure before investigation in reliance upon that promise.

The Government brief inferentially concedes that whether there was a disclosure on March 26, 1945, to Collector Pedrick was a question of fact by attacking E. Allan Lustig's credibility (pp. 19-20) and by discussing the evidence claimed to be in contradiction of his testimony, even the testimony of alibi witnesses depending on a matter of minutes (pp. 20-23), without saying a word about the corroborating testimony of credible witnesses and the very strong corroboration by the facts and circumstances.

It discusses the testimony of a handwriting expert denying the authenticity of Exhibit SS, E. Allan Lustig's letter of March 24, 1945, to Collector Pedrick (pp. 21-22), without mentioning the fact that that testimony was completely discredited.

In recounting E. Allan Lustig's disclosure to Collector Pedrick on March 26, 1945, the Government fails to mention the testimony that the Collector said this "took the criminal aspect out of the case and made it a civil case, there might be civil penalties but there are no criminal penalties when you come in in a case of this sort" (R. 1110).

It says (p. 15) that on March 27th "McQuillan requested various tax returns pertaining to the case", but does not

mention the fact that that was the day following the disclosure testified to by E. Allan Lustig. A reference to the record cited (R. 2080) will disclose in any event that he merely asked for information as to the filing of returns by Henry Lustig, whose returns are not involved, and three of the seven corporate taxpayers.

It says that McQuillan informed counsel for the Petitioners on April 26, 1945, that they were "too late" (p. 16), but omits to state that he was flatly contradicted by Mr. Oestreicher (R. 959-960). Again at page 22, the Government brief adds that Oestreicher was told by Scanlon on May 15th that the disclosure was too late, but again the Government omits to state that this was flatly contradicted by Oestreicher, and that Scanlon, although present throughout the trial, did not even take the witness stand.

It says that the Circuit Court of Appeals thought it "clear" that "the investigation began at the latest on March 24, 1945" (p. 27). That statement was obviously based on the memorandum of that date transmitting to McQuillan the report of bank deposits to the Treasury by the Federal Reserve Bank (Ex. 333, R. 2076), which deposits the Petitioners knew would be reported when they were made.

It ignores the evidence that no request was ever made of Collector Pedrick for the corporate tax returns, that the only investigation made prior to April 25, 1945, was to confirm the fact of the bank deposits by checking at the Federal Reserve Bank and the depository banks, and that the only investigation of the corporate tax frauds ever made was begun by Diehl on May 14, 1945, pursuant to the disclosure letters of April 25th (Petition, pp. 11, 13).

It disregards the authoritative definition by Chief Counsel Wenchel of the meaning of the "beginning of an investigation" under the disclosure policy, quoted in the Appendix to the Petitioners' brief annexed to the petition, and Mr. Wenchel's testimony at the trial (R. 1559-1560).

The question when the investigation began was plainly a question of fact for the jury.

The Government emphasizes the finding of the District Court that the currency re-deposits were prompted by the fear of some Government action (p. 26) without reference to Finding 23 (R. 2178) that the disclosure was brought about solely by the knowledge that the re-deposits would lead to a discovery of the tax frauds, a finding which discloses the fundamentally erroneous view of the District Court that the disclosure was induced by fear, and therefore not by a promise of immunity.

It says that on April 18, 1945, Examiner Diehl "was assigned to the Lustig matter" and that on May 14, 1945, "he appeared at the offices of the Lustig companies and started on an examination of their books", thus creating the impression that Diehl's investigation of the tax frauds was wholly independent of any disclosure; but it does not mention the undisputed facts that on April 18th Diehl was given only Henry Lustig's individual return to examine, that the examination of the corporate books begun by him on May 14th was solely under and pursuant to the disclosure letters of April 25th, that his examination confirmed the correctness of Sobel's computations of the understatements of corporate income which the Circuit Court of Appeals said were given to Collector Pedrick on April 25th, and that there is no pretense that the corporate returns were ever requested or procured by any investigator or were ever examined in the investigation of any tax frauds except by Diehl pursuant to said April 25th letters.

Finally the Government is driven to claim (p. 31) that the jury were permitted to consider the disclosure evidence on the question of intent to defraud the revenue in filing false tax returns, which it admits was not disputed (p. 32). The Circuit Court of Appeals paid no attention to that claim.

The Government says that under that charge the jury might have acquitted the Petitioners on three of the twenty-three counts of the indictment. The jury could not be expected thus to discriminate on an issue that was not in

dispute in respect of any of the counts. Their recommendation of clemency plainly indicates that they thought the Treasury had broken its promise.

Intent to defraud and intent to make disclosure of the fraud committed are quite different questions of intent. The submission of evidence on the uncontested issue of intent to defraud could not cure the error in instructing the jury that they could not consider the evidence on the contested issue of intent to make full disclosure.

In its argument it attempts to dispose of questions of law on the ground that this Court will not review the post-trial findings of fact by the District Court concurred in by the Circuit Court of Appeals (pp. 26-29).

The Petitioners are not asking for a review of those findings of fact. They are invoking their constitutional right to have those contested questions of fact submitted to a jury.

The Government attempts to dispose of the constitutional question of due process and self-incrimination on the grounds, (a) that "the admissibility of evidence is within the exclusive province of the trial judge", which no one disputes, (b) that "the evidence could have been obtained through the use of legal process", without any claim that it was so obtained and much of the evidence disclosed, notably Sobel's computations of the understatements of income and the explanation of precisely how such understatements were made, could not have been obtained by legal process, and (c) that the Trial Court submitted the disclosure evidence to the jury on the question of intent to defraud the revenue in filing false tax returns, which intent to defraud was not disputed in respect of any of the counts.

The Government does not question a single statement made in the petition, except to say "petitioners' reference to their April 25 letters as 'confessions, unique for frankness and completeness' (Pet. 27), involves not so much hyperbole as irony". The reference was to the full and detailed disclosure pursuant to those letters. It was estab-

lished by the one person who knew, no other than Examiner Diehl himself (Petition, p. 11).

The Government's partial and inaccurate statement of evidence is alone sufficient to show that there was a question of fact for the jury.

Although its entire argument on the question of immunity is that the District Court found post-trial that there had been no disclosure before investigation and that the Circuit Court of Appeals concurred, it admits in a note that the Trial Court charged the jury that though "the Petitioners had made full disclosure" the "prosecution would not be foreclosed" and in support of that ruling cites authorities, not one of which involved the question whether the Treasury had the power, which it has exercised for more than twenty years, to grant immunity from criminal prosecution to delinquent taxpayers for making voluntary disclosures before investigation (p. 29).

The Petitioners ask an opportunity to present that question to this Court together with the question whether, if the Treasury promise was *ultra vires*, the use of the evidence disclosed in reliance upon it was a denial of due process and a violation of the Petitioners' constitutional immunity from self-incrimination.

Respectfully submitted,

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In the Supreme Court of the United States

OCTOBER TERM, 1947

No. 279

HENRY LUSTIG, E. ALLAN LUSTIG AND JOSEPH
SOBEL, PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED
STATES CIRCUIT COURT OF APPEALS FOR THE SECOND
CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINIONS BELOW

The District Court rendered no opinion. The opinion of the Circuit Court of Appeals (R. 2193-2201) has not yet been reported.

JURISDICTION

The judgment of the Circuit Court of Appeals was entered on July 21, 1947 (R. 2201). The petition for a writ of certiorari was filed on August 19, 1947. The jurisdiction of this Court is invoked under Section 240 (a) of the Judicial Code, as amended by the Act of February 13,

1925. See also Rules 37 (b) (2) and 45 (a), F. R. Crim. P.

QUESTIONS PRESENTED

1. Whether the petitioners were denied their constitutional rights by withdrawal of the alleged voluntary disclosure from the jury's consideration except insofar as it might be relevant to the element of wilfulness in connection with the filing of admittedly false returns.

2. Whether the petitioners were denied their constitutional rights by the trial court's admission of certain corporate records allegedly obtained by the Government as the result of a promise of immunity.

3. Whether the alleged disclosure effected a compromise within the meaning of Section 3761 of the Internal Revenue Code.

STATUTE AND EXECUTIVE ORDER INVOLVED

Internal Revenue Code:

SEC. 3761. COMPROMISES.

(a) *Authorization*.—The Commissioner, with the approval of the Secretary, or of the Under Secretary of the Treasury, or of an Assistant Secretary of the Treasury, may compromise any civil or criminal case arising under the internal revenue laws prior to reference to the Department of Justice for prosecution or defense; and the Attorney General may compromise any such case after reference to the Department of Justice for prosecution or defense.

(b) *Record*.—Whenever a compromise is made by the Commissioner in any case there shall be placed on file in the office of the Commissioner the opinion of the General Counsel for the Department of the Treasury, or of the officer acting as such, with his reasons therefor, with a statement of—

- (1) The amount of tax assessed,
- (2) The amount of additional tax or penalty imposed by law in consequence of the neglect or delinquency of the person against whom the tax is assessed, and
- (3) The amount actually paid in accordance with the terms of the compromise.

(26 U. S. C. 3761.)

Executive Order No. 6166, June 10, 1933 (5 U. S. C., Sec. 124 *et seq.*):

SEC. 5. *Claims by or against the United States*

The functions of prosecuting in the courts of the United States claims and demands by, and offenses against, the Government of the United States and of defending claims and demands against the Government, and of supervising the work of United States attorneys, marshals, and clerks in connection therewith, now exercised by any agency or officer, are transferred to the Department of Justice.

As to any case referred to the Department of Justice for prosecution or defense in the courts, the function of decision whether and in what manner to prosecute, or to defend, or to compromise, or to ap-

peal, or to abandon prosecution or defense, now exercised by any agency or officer, is transferred to the Department of Justice.

For the exercise of such of his functions as are not transferred to the Department of Justice by the foregoing two paragraphs, the Solicitor of the Treasury is transferred from the Department of Justice to the Treasury Department.

Nothing in this section shall be construed to affect the function of any agency or officer with respect to cases at any stage prior to reference to the Department of Justice for prosecution or defense.

STATEMENT

The indictment.—The petitioners were indicted on December 6, 1945 in the Southern District of New York on twenty-three separate counts (R. 1). The first twenty-two counts charged them with wilfully attempting to defeat and evade, by the filing of false and fraudulent returns, for fiscal and calendar years ending during the years 1940 to 1944, inclusive, substantial amounts of taxes owing by seven corporations owned by Henry Lustig (R. 11-57). The indictment charged that these returns understated net income by a total of \$3,455,755.41 and the resultant tax liability by a total of \$2,872,766.62 (R. 723, 2172; Ex. 306, R. 2026). The twenty-third count charged that the petitioners conspired to commit all of the substantive offenses, in pursuance of which the following overt acts, *inter alia*, were committed: the over-

statement of purchases by \$2,000,000; the understatement of sales by \$1,800,000; the receipt by Henry Lustig of a substantial part of coat and hat check gratuities; the maintenance by Henry Lustig of a safe deposit box to hide currency (R. 53-57).

The defendants.—Henry Lustig was the owner of all of the stock of Henry Lustig Co., Inc. (Ex. 114, R. 1962), which in turn owned all of the stock of Restaurants & Patisseries Longchamps, Inc. (Ex. 98, R. 1958). The latter corporation in turn owned all of the stock of 253 Broadway Corporation, 624 Madison Avenue Corporation, Broadway and 41st Street Corporation, Lexington Longchamps, Inc., and Fifth Empire, Inc. (Exs. 251, 232, 184, 159, 207, R. 1999, 1994, 1981, 1974, 1987). Henry Lustig was the president and treasurer of all these corporations. E. Allan Lustig, Henry Lustig's nephew, was secretary and general manager of all the corporations. (R. 394.) Joseph Sobel, a certified public accountant, acted as chief accountant for the corporations (R. 395).

Martin Platt, office manager and cashier at the main office of all the corporations, and Wallace Platt, his brother, acted as bookkeepers for the Lustig corporations (R. 291, 393-394). The Platts entered pleas of guilty (R. 235-237) and testified for the Government (R. 290-392, 392-429, 492-656).

The fraud.—In the early part of 1941, Wallace Platt prepared a trial balance for Restaurants &

Patisseries Longchamps, Inc., for the year 1940 and submitted it to Joseph Sobel for final approval (R. 294). Sobel instructed him to overstate purchases (R. 295). Platt informed Sobel that it was "the wrong thing to do", to which Sobel replied (R. 296):

I got a lot more to worry about than you.
I am a CPA. I am telling you what to do.
If you don't feel like doing it there is
somebody else who will.

Wallace Platt was given a period of grace to make a decision; he complied with Sobel's instructions (R. 296). Sobel furnished him with a memorandum itemizing the amounts by which purchases were to be increased (R. 295), instructed him to erase correct monthly totals on the ledger sheets and to substitute new and higher figures (R. 298, 304). Platt was instructed to use a pen knife rather than an eraser because figures erased with a pen knife would be less conspicuous and because with a pen knife it would be possible to make erasures without crossing the accounting lines (R. 313). Eventually, however, Sobel permitted Wallace Platt to use an eraser in order to save time (R. 314). The same system was used to falsify the records of earnings of Restaurants & Patisseries Longchamps, Inc., for subsequent years, as well as the records for the other corporations (R. 305).

In 1943, Sobel informed Wallace Platt that the profits of the corporations were enormous and

that the excess profits tax would "take away most of the profits" (R. 331, 333). He instructed Platt to falsify sales as well as purchase figures, the former by a pre-determined amount daily (R. 331, 339). Wallace Platt protested that "suckers" like himself have to pay taxes and that Henry Lustig decided "for himself how much he wants to pay" (R. 331-332).

Henry Lustig Co., Inc., the top holding company, was engaged in the wholesale produce business (R. 435), catering both to independent customers and to its subsidiaries. Restaurants & Patisseries Longchamps, Inc., the intermediate holding company, owned and operated a number of restaurants in the City of New York and each of its subsidiaries owned and operated a restaurant in the City of New York. Several of these restaurants paid as rent a percentage of their receipts (R. 330-331). In order to allay the suspicions of the lessors, true statements of the sales were furnished to them and the proper percentage paid (R. 333), while special books were kept for income tax purposes (R. 334). Complicated adjustments were necessary to reconcile the true and the fraudulent set of books; for income tax purposes the true rent paid could not be revealed, lest it furnish a clue to the actual income from sales (R. 334).

The bookkeeping phase of the scheme had become so complicated that a special office was built in which Wallace Platt could attend to his manip-

ulations without being observed by the rest of the office staff (R. 343-344). The manipulation of the books of Henry Lustig Co., Inc., was performed by one Morris Brown until 1943; illness forced him to retire (R. 434, 436-445). Thereafter, Martin Platt took charge of making false entries (R. 505, 507).

The daily receipts of the restaurants were regularly deposited in various corporate bank accounts (R. 398). To obviate the disparity between the bank accounts and the manipulated books, the excess funds on deposit were withdrawn. Checks were drawn on check blanks extracted from the back of corporate check books, made payable either to the order of Henry Lustig, personally, or to cash. (R. 405-406, 413.) Some of these checks were deposited in Henry Lustig's personal bank accounts in New York City, Miami, Florida, and Lexington, Kentucky (R. 413, 414, 418). Most of the checks were simply cashed and the money was delivered to Henry Lustig (R. 405-407, 416), who secreted a large part of it in the vault at the County Safe Deposit Company in the City of New York (R. 548-549). The checks were drawn pursuant to general instructions given by Joseph Sobel to Martin Platt (R. 405-406). Martin Platt received the schedule of the amounts to be withdrawn weekly from every corporation (R. 406), which amounts were not to be recorded on the check stubs (R. 405). Ini-

tially, these checks, together with slips of paper giving essential data about each (R. 405-406), were presented to Henry Lustig for signature (R. 406). After signing each check, Henry Lustig retained the paper slip pertaining to it (R. 406). The check was given to Martin Platt to be cashed at the bank on which it was drawn (R. 406). The first time Martin Platt cashed one of these checks he received \$100 bills from the bank and gave them to Henry Lustig (R. 406). Lustig instructed him to get at least \$500 or \$1,000 bills the next time (R. 406).

After a few such transactions, Henry Lustig instructed Martin Platt to have the checks signed by E. Allan Lustig (R. 406-407). Martin Platt conveyed these instructions to Allan and from then on the latter signed the checks and kept the accompanying slips of paper (R. 407). The cash in every instance was given to Henry Lustig (R. 407, 416). This withdrawal of cash began in February, 1943, and continued until the middle of December, 1944 (R. 405, 416). The amounts withdrawn weekly gradually increased from about \$8,000 to about \$40,000 (R. 423). Approximately \$2,200,000 was withdrawn by checks made payable to cash and about \$600,000 more was withdrawn by checks made payable to Henry Lustig (R. 423-424).

Fictitious banks loans were entered on the corporate books and fictitious interest was withdrawn

(R. 313, 441). Substantial payments for Henry Lustig's personal expenses were made from corporate funds (R. 660-690).

The books of the corporations contained no trace of any part of the proceeds from hat check stands in the various restaurants. These proceeds were delivered once a month in cash to Henry Lustig personally; he directed that only a small part be deposited to the various corporate accounts and he retained the major portion (R. 398.) Martin Platt estimated that the hat check tip money averaged approximately \$7,000 to \$8,000 per month (R. 399) and that approximately 15% to 20% of it was deposited (R. 400).

False corporate returns were prepared by Wallace Platt under the direction of Joseph Sobel (R. 294-305). They were signed by Henry or E. Allan Lustig and in a few instances by one Kal C. Lustig. All of the returns also carried the signatures of Joseph Sobel and Wallace Platt. (Exs. 1-45, R. 1925-1939.) The total net income understated by the seven corporations in the tax returns covered by the first twenty-two counts of the indictment was proved to be the amount charged in the indictment, namely, the total sum of \$3,455,755.41, and the resultant understatement of tax liability was established as the total sum of \$2,872,766.62 (R. 723, 2172; Ex. 306, R. 2026). This calculation does not include the hat check money for which no precise figures are available.

The currency deposits in 1945.—Early in 1945 there were widely current and published rumors that bills in large denominations might be recalled, their owners made to account for them (R. 1275, 1318, 2172), and that safe deposit boxes might be “frozen” (R. 1281).

Beginning on February 28, 1945, and continuing until March 28, 1945, the petitioners removed, at various times, \$1,815,000 in bills of large denominations (\$500 and \$1,000) from the vault in which they had been hidden and deposited that money in eight banks, to more than twenty-five bank accounts, some of them corporate, some of them personal and belonging to Henry Lustig (R. 554-564, 2102-2108). Fifty-seven deposits were made (R. 1191), only a few of them at the Lawyers Trust Company, which was the bank located directly above the safe deposit company in which the currency had been secreted (R. 1198). Many new accounts were opened during this period to receive some of the deposits (R. 645). The amounts deposited bore no relationship to the corporate funds diverted; two corporations received no deposits (R. 1198) and Henry Lustig's personal accounts received \$808,000 (R. 1199). No entry on the corporate books was made relating to any of these deposits until the end of April (R. 654-655).

During that period in which the money was being deposited, the hat check receipts continued to be handled in the usual way. Approximately

20% was deposited on March 27, 1945, and reported on the books, and the balance of approximately \$5,000 was given to Henry Lustig in cash. (R. 401-402.)¹

The last returns which are the subject matter of the indictment were not filed until March 15, 1945 (Exs. 10, 11, 44, 45, R. 1928, 1939). One understated the tax due by \$687,866.95 and the other by \$19,026.81 (R. 2178; Ex. 306, R. 2026). Both were signed by Henry Lustig and Joseph Sobel (Exs. 10, 11, 44, 45, R. 1928, 1939). The instructions to falsify the books of the two corporations for which these returns were filed were given during the two-week period preceding the filing of the returns on March 15, 1945, when, after receiving financial statements of the amounts of profit of Restaurants & Patisseries Longchamps, Inc., and of Henry Lustig Co., Inc., as shown by the books, which had already been subjected to false daily entries, Sobel directed further overstatement of purchases in the amount of \$475,000 for one corporation and \$36,000 for the other (R. 354-355, 508). He ordered that this should be done by making new ledger sheets rather than by erasures "because it would

¹ The April and May hat check collections were likewise not deposited in full. When Martin Platt delivered the balance to Henry Lustig at the end of April he was told to see Sobel, who advised him that he would show him how to treat it (R. 402-403). Meanwhile, the April and May hat check collections were kept in the office safe (R. 403). The April, May and June collections were finally deposited in the corporate accounts on July 14, 1945 (R. 403, 404).

show" (R. 508-509). The original sheets were to be destroyed (R. 509).

On February 19, 1945, E. Allen Lustig, on behalf of Broadway and Forty-first Street Corporation, signed and filed with the revenue agent's office a Form 874 consenting to an additional assessment of \$604.28 for the fiscal year ending March 31, 1944, the true deficiency for that year being \$206,461.92 (R. 1189; Ex. 319, R. 2028). On April 6, 1945, a similar form was filed concerning the tax liability of 253 Broadway Corporation, providing for an additional assessment of \$59.02 for the fiscal year ending June 30, 1944, the true deficiency for that year being \$44,774.67 (R. 1207-1207; Ex. 323, R. 2036).

The genesis of the prosecution.—Between March 3 and 13, 1945, the Foreign Funds Control Department of the Federal Reserve Bank in the City of New York received reports (R. 1332, 2056) from various member banks that large sums of money were being deposited to the accounts of Henry Lustig and those of his corporations. These reports, which contained the numbers of the bills deposited, were referred for investigation to Joseph A. Sarno, a Federal Reserve Bank employee. Both Henry Lustig and the various named corporations were checked for possible Axis involvements, but no connection with any foreign country was found. (R. 1332.)

On March 15, 1945, Sarno wrote a memorandum addressed to Norman P. Davis, in charge of the

Foreign Funds Control Department, setting forth a list of the currency involved (R. 2054, 1332). The memorandum was handed to Davis on the afternoon of March 15, 1945. On the morning of March 16, 1945, Davis went to Washington and transmitted the memorandum to L. C. Ahrens, Assistant General Counsel of the Treasury Department (R. 1336).

On March 24, 1945, Joseph J. O'Connell, General Counsel of the Treasury Department, gave the memorandum to W. H. Woolf, Chief of the Intelligence Unit of the Bureau of Internal Revenue (R. 2076). On March 24, 1945, Commissioner of Internal Revenue Joseph D. Nunan, Jr., conferred in New York City with Hugh McQuillan, Special Agent in Charge of the New York office of the Intelligence Unit, and gave the latter directions concerning Lustig and his enterprises (R. 1343). On the same day, March 24, 1945, Woolf also spoke on the telephone with McQuillan (R. 1343-1344) and thereupon forwarded a letter to McQuillan, dated March 24, 1945, referring to the "telephone conversation of even date" and enclosing the memorandum of Davis concerning the cash deposits made by Lustig and his corporation (R. 2076). This letter was received by McQuillan on March 26, 1945 (R. 1344).

On March 26, 1945, McQuillan and Nunan visited the Federal Reserve Bank in New York City and conferred with its president, Mr. Sproull, and

its vice-president, Mr. Rounds (R. 1347). On the same day, McQuillan called Revenue Agent in Charge Krigbaum "into the investigation" (R. 1353). He arranged with Krigbaum to select one of his best agents (R. 1354). On March 26 or 27, 1945, McQuillan assigned special agents to the investigation of Lustig and his companies (R. 1348). On March 27, as a result of Woolf's letter and his conversations, McQuillan requested various tax returns pertaining to the case (R. 1347, 2080).

McQuillan was in daily contact with Krigbaum (R. 1353, 1376), with the special agents (R. 1348) and with his superiors in Washington (R. 1378, 1382). Periodic reports of the progress of the case were sent to Woolf in Washington (E. g., R. 2082, 2087).

On April 18, 1945, one Donald C. Diehl, an internal revenue agent, was assigned to the Lustig matter. On April 19, 1945, he telephoned Sobel for an appointment to examine the records pertaining to the income tax returns of Henry Lustig for the year 1944. Sobel declined to make an appointment immediately, promised to call Diehl back, but failed to do so (R. 701). When Diehl called him again on April 23, 1945, an appointment was made for April 30. Counsel for Henry Lustig requested a further postponement until May 2, and because Diehl was then taken ill, it was not until May 14, 1945, that he appeared at

the offices of the Lustig companies and started an examination of their books. (R. 702.)

Meanwhile, on April 25, 1945, the petitioners filed letters (Ex. BB, R. 2123-2125) with the Collector of Internal Revenue William J. Pedrick indicating that the tax returns of the corporations "understated" the tax liability, without disclosing the amounts or the years (R. 1427).

Counsel for the petitioners were at once referred to McQuillan (R. 1429), who informed them on April 26, 1945, that they were too late because the investigation had been under way "for some weeks" (R. 1357-1358).

Petitioners' version of their "disclosure" activities.—The petitioners' version of the events preceding the filing of the letters is contained largely in the testimony of E. Allan Lustig, the only one of the petitioners who gave evidence. Allan testified that Henry Lustig told him sometime in January, 1945, that Sobel, in December, 1944, had said that the income tax returns of the various companies were "wrong." Henry Lustig allegedly stated that as soon as he returned from a trip to Florida he would "redeposit" the money that had been accumulated in the company vault and that he would "make a disclosure" of the fact that incorrect returns had been filed (R. 1084).

On February 27, Henry Lustig returned from Florida (R. 1089). Beginning February 28, cash deposits were made in various accounts by the

Lustigs (R. 1089, 2102-2108). E. Allan Lustig denied that these deposits were in any way connected with the reports then widely current that the Treasury was about to call in bills of large denominations and would make their possessors account for them (R. 1182-1183, 1184).

Between March 3 and 9, 1945, E. Allan Lustig observed bank tellers making notations "of the bills." He asked why that was being done (R. 1090) and was told that it was for "the record" (R. 1091). This was news to him (R. 1089-1094) and he allegedly reported his observation to Henry Lustig (R. 1091).

After some deposits had been made, E. Allan Lustig was informed by two bank officers that the currency deposits might have to be reported to the Government sometime in the future (R. 1095, 1098). He then had a conversation with Henry Lustig and Joseph Sobel (R. 1099) and he then allegedly endeavored to get in touch with William J. Pedrick, the Collector of Internal Revenue. He testified that he tried to reach Pedrick by telephone, that he tried to visit him, and that when he was unsuccessful, he requested an appointment by letter (R. 1100), of which Exhibit SS, (R. 2140) was an alleged carbon copy retained in the Lustig files. The carbon copy was dated March 24, 1945, and allegedly Pedrick called E. Allan Lustig on March 26, 1945, and made an appointment to see him at the 59th Street Longchamps

Restaurant at twelve o'clock of the same day (R. 1106-1107). Allan informed him at the luncheon that he wanted to discuss tax returns with him and suggested a later meeting at the Custom House. There followed a second telephone call and a later meeting was allegedly arranged for four o'clock of the same day at the Custom House. (R. 1108.) Allan fixed the hour of this alleged meeting definitely "around four o'clock" and testified that he had a "long and cordial conversation" with Pedrick (R. 1203) whom he left at about five o'clock (R. 1206).

E. Allan Lustig further testified that he told Pedrick at that time that wrong returns had been filed, that large amounts of money had been accumulated in a bank vault, and that this money was then being redeposited. Pedrick allegedly stated that he would look into this and check with Krigbaum's office. (R. 1109.)

On April 10, E. Allen Lustig allegedly saw Pedrick and at that time Pedrick allegedly told him that he had checked both Krigbaum and McQuillan and could "find nothing there against us" (R. 1115).

On April 19 and 20, 1945, E. Allan Lustig allegedly attempted to reach Pedrick and finally managed to see him on April 20 (R. 1116, 1134). He denied that his activity in trying to locate Pedrick had anything to do with the fact that Agent Diehl had called Sobel on April 19 (R.

1135). He stated that when he did see Pedrick he mentioned that Diehl had called and that in reply Pedrick told him that there was nothing to worry about (R. 1117).

In the afternoon of April 20, the Lustigs and Sobel saw one Oestreicher, a tax consultant. (R. 1117.)

Allegedly, another meeting between E. Allan Lustig and Pedrick took place on April 24, at which Pedrick requested E. Allan Lustig not to mention in the letters then being prepared that the Lustigs had made a disclosure to him for the reason that his failure to notify others at once about the disclosure might cost him his job (R. 1118-1120).

On April 24, Oestreicher called Commissioner Nunan and stated, without disclosing the name of his client, that he wanted to make a voluntary disclosure. Commissioner Nunan referred him to Pedrick. (R. 926.) A meeting took place in Pedrick's office on April 25, 1945, at which letters stating that taxes of the Lustig companies had been understated were turned over to Pedrick (R. 928-930). Both Oestreicher and E. Allan Lustig testified that Pedrick on that occasion stated that E. Allan Lustig had been to see Pedrick before about the matter (R. 930, 1123).

The credibility of E. Allan Lustig.—E. Allan Lustig testified at the trial that he had signed checks to the order of cash, totalling about

\$40,000 weekly, without having any idea about what the cash was to be used for (R. 1175); that although he determined what prices were to be charged in the restaurants (R. 1163-1164), he did not know whether his price policy caused profits or losses (R. 1165-1168); that he had signed several of the false corporate returns (Exs. 16, 17, 20, 21, 28, 29, 36, 37, R. 1930-1931, 1934, 1936-1937); and that during four years, on his own income tax returns, he claimed his mother-in-law as a dependent although she had been dead for some time (R. 1147-1149).

The contradiction of E. Allan Lustig's testimony.—Collector Pedrick testified that he had two meetings with E. Allan Lustig on April 10, 1945, and that he had not seen him for more than a year prior to that date (R. 1417). At the first meeting they discussed matters other than tax matters (R. 1418-1419). Later in the day E. Allan Lustig asked him whether he knew who the person was who had been referred to in a newspaper column as being a restaurateur under investigation for income tax evasion (R. 1419). Collector Pedrick informed E. Allan Lustig that he did not know (R. 1419, 2173-2174).

Pedrick, corroborated by his diary, denied that he had met E. Allan Lustig at all on March 26 (R. 1432). One Glick, then an O. P. A. official, on the basis of his diary, testified that he and not E. Allan Lustig lunched with Pedrick that day (R. 1487-1488). Concerning the later meet-

ing on the same day, which allegedly took place at four o'clock and lasted for about an hour, the following citizens of New York testified that Pedrick, as a matter of fact, had been with them between four and five-thirty of that day and consequently could not have been at the Custom House with E. Allan Lustig: Charles C. Lockwood, Justice of the Supreme Court of the State of New York (R. 1485-1486); Jonah J. Goldstein, Judge of General Sessions of the City of New York (R. 1486-1487); Robert Moses, head of the New York City and New York State Park Systems, head of the Triboro and Tunnel Authority, Member of the New York City Planning Commission and coordinator of construction in New York City (R. 1515-1517); John A. Coleman, Chairman of the Board of the New York Stock Exchange (R. 1544-1546); Howard Cullman, Chairman of the Port Authority (R. 1546-1547); George R. VanNamee, former Public Service Commissioner and Secretary to former Governor Alfred E. Smith (R. 1547-1548); Herbert Bayard Swope, associate member of the United States Atomic Bomb Commission (R. 1548-1549); Eugene F. Moran, vice-chairman of the Governor Smith Memorial Fund (R. 1550).

Concerning Exhibit SS, an alleged carbon copy of a letter with which the crucial appointment for March 26 was made, a handwriting expert testified that stenographic notes from which

Exhibit S3 was supposed to have been copied, could not have been written on March 24, as they purported to be, but were added to the note book at some date after April 3, 1945 (R. 1537).

Moreover, neither the appellants nor their attorneys referred to any purported disclosure prior to that of April 25, 1945, until the afternoon of August 17, 1945 (R. 1551-1552; R. 1476-1478), although numerous occasions called for it. For instance, no reference to such disclosures was made to Agent Diehl when he telephoned Sobel on April 19 and April 23, 1945 (R. 701-702), or in Oestreicher's telephone conversation with Commissioner Nunan on April 24 (R. 926), or in the letters of April 25 (Ex. BB, R. 2123-2125, see R. 134); nor did Oestreicher refer to the earlier date when McQuillan on April 26, and Scanlon on May 15, pointed out to him that his disclosure was too late (R. 1357-1358; Ex. 338, R. 2090).

On May 25, Oestreicher admittedly learned that the Treasury Department did not consider the disclosure as having been timely made (R. 1232), and appreciated that the date became important (R. 1232). Nevertheless in Oestreicher's letter of June 1, to the Commissioner (Ex. 326, R. 2038-2041), in which he stated that he was setting forth a "chronological outline of the steps taken by the taxpayer in order to effect such disclosure", no reference is made to March 26, other than to point

out that it was on this date that Mr. Lustig called at Oestreicher's office for an appointment; the only claim of an earlier disclosure is the contention that the large bank deposits were the first affirmative step in making a voluntary disclosure.

Nor did any of the following events elicit from Oestreicher any reference to the alleged disclosure on March 26, 1945: the Commissioner's letter of June 7, 1945 (Ex. 327, R. 2046) pointing out that there was no voluntary disclosure; the knowledge that on June 5 the Department of Justice was interested in the case by reason of the service of a subpoena (R. 1022); or conferences with Commissioner Nunan, Mr. Wenchel, Chief Counsel of the Bureau of Internal Revenue and others on August 15, 1945, and again on the morning of August 17, 1945 (R. 1551-1552).

Appellants' answer to the charge of recent contrivance is that Pedrick had pledged Allan to secrecy on the ground that his failure to notify others at once about the disclosure might cost him the collectorship (R. 1120), and that secrecy about this matter was first abandoned on August 17, 1945.

Petitioners' motion to suppress.—Prior to trial the petitioners, together with Henry Lustig Co., Inc., Restaurants & Patisseries Longchamps, Inc., Fifth Empire, Inc., Lexington Longchamps, Inc., 624 Madison Avenue Corporation, Broadway and Forty-first Street Corporation and 253 Broadway

Corporation, moved for an order suppressing the use of certain corporate books and records allegedly illegally obtained by the Government through promise of immunity contingent upon a voluntary disclosure (R. 94-140).² The motion was denied with leave to renew at trial (R. 158). The motion was renewed at trial and was disposed of at the conclusion of the trial, the court denying the motion to suppress in its entirety (R. 2180-2181). In connection with its disposition of the motion to suppress, the District Court made detailed and specific findings of fact (R. 2171-2178), which are more fully discussed in the Argument, *infra*, pp. 26-28.

Trial, verdict, and appellate proceedings.—At trial, the court charged that as a matter of law prosecution was not barred by the petitioners' alleged compliance with the Treasury Department's voluntary disclosure policy (R. 1861-1862). Nevertheless, the court specifically reserved for the jury's consideration, on the question of the existence of intent to commit the crimes charged, all of the evidence pertaining to the alleged disclosure (R. 1872-1879).

The petitioners were convicted by a jury on all counts (R. 1897) and were thereafter sentenced

² The so-called voluntary disclosure policy of the Treasury Department provides generally that in cases in which taxpayers make voluntary disclosures of intentional evasions before investigation, no criminal prosecution will be recommended by the Treasury Department to the Department of Justice.

substantially as follows: Henry Lustig, four years' imprisonment and a \$115,000 fine; E. Allan Lustig, three years' imprisonment; Joseph Sobel, two years' imprisonment (R. 1915-1916).

By stipulation the Circuit Court of Appeals approved the consolidation, *inter alia*, of appeals (1) by the petitioners from the judgment of conviction (R. 2184-2185) and (2) by the petitioners and the aforementioned corporations from the order (R. 2180-2181) denying the application for the suppression and return of evidence (R. 2186-2187). Upon appeal, the Circuit Court of Appeals for the Second Circuit found, *inter alia*, that the investigation began at the latest on March 24, 1945 (R. 2197-2198); that it was "fantastic" to suppose that the making of deposits with the funds withdrawn from the safe deposit box amounted to a voluntary disclosure (R. 2196); that there was no disclosure of tax deficiencies until April 25, 1945 (R. 2197); that the proffer of corporate records was in no sense the result of any promise of immunity (R. 2198); that the petitioners' constitutional privileges were not invaded (R. 2199); that the petitioners received no immunity under the compromise statute (R. 2199). Accordingly it affirmed the judgment of conviction (R. 2201).

ARGUMENT

The petition in this case presents arguments resting and depending on an assumption which is entirely hypothetical, viz. that petitioners made a

voluntary disclosure amounting to a confession which was induced by a promise of immunity. That assumption is quite without support on the present record, in consequence of which the questions sought to be presented are never reached.

1. The District Court found as a fact that "At no time between February 28, 1945 and April 25, 1945 was any act of the defendants or of the corporate taxpayers prompted or brought about by any inducement held out to them by any person in authority or any person connected with the government" (Fdg. 19, R. 2176), and that "at no time" during those dates "were the defendants or the corporate taxpayers coerced or compelled or induced, either with or without process, to make incriminatory disclosures" (Fdg. 20, R. 2177).

The District Court likewise found as a fact that the March currency redeposits "were prompted by the belief that currency in bills of large denominations might in effect become contraband and not by any desire or intention voluntarily to disclose frauds on the revenue" (Fdg. 19, R. 2176), and that the filing of two additional fraudulent tax returns after substantial redeposits of currency had been made "conclusively establish[es] that the redeposit of currency was no evidence of any intention on the part of the defendants or the corporate taxpayers to make voluntary disclosure of the frauds theretofore practiced," and "that said redeposits had no connection with or

bearing upon crimes against the revenue" (Fdg. 24, R. 2178). The Circuit Court of Appeals characterized the contention that the making of these deposits amounted to a voluntary disclosure in response to a promise of immunity as "fantastic" (R. 2196).

The District Court further found that "Neither the defendants nor the corporate taxpayers at any time prior to April 25, 1945 disclosed the fraudulent practices of the corporate taxpayers to any government official" (Fdg. 18, R. 2176), and also specifically found that statements submitted in affidavits to the effect that "voluntary disclosure" was discussed between E. Allan Lustig and Collector Pedrick on March 26, April 10, 20, and 24, were false. (*Ibid.*). The Circuit Court of Appeals thought it "clear" that "the investigation began at the latest on March 24, 1945" (R. 2197-2198).

The first disclosure was that contained in the letters of April 25, 1945 (R. 2123-2124; see also R. 134), which contained an invitation to examine the corporate taxpayers' books. Those letters, the District Court found, "were not frank and full disclosures, were not voluntarily made, and were delivered at a time when the defendants well knew that an investigation of their affairs and those of the corporate taxpayers had actually been initiated" (Fdg. 22, R. 2177-2178). "On April 25, 1945, the extent of the frauds practiced by the

corporate taxpayers was not disclosed" (Fdg. 14, R. 2175). These "belated and partial revelations" (Fdg. 23, R. 2178) were "prompted solely by the fact that the defendants and the corporate taxpayers knew that an investigation of their affairs had begun and that an Internal Revenue Agent had made an appointment, deferred at the request of the defendants and of the corporate taxpayers, to commence an examination of the books of the defendant Henry Lustig on April 23, 1945" (Fdg. 19, R. 2176-2177). The subsequent investigation of the books of the corporate taxpayers, between May and August 1945, "was invited by the defendants and by the corporate taxpayers with full knowledge that an investigation had been commenced which would lead to the discovery of fraudulent entries in the books of the corporate taxpayers, and with full knowledge of the fact that said investigation could be commenced and continued with or without the consent of the defendants or the corporate taxpayers" (Fdg. 21, R. 2177).

The Circuit Court of Appeals likewise noted "that the corporate records were in no sense the result of any promise of immunity. They were furnished long after the government investigation had begun" (R. 2198).

These concurrent findings, accurately reflecting the record (see Statement, *supra*, pp. 13-23), need not be independently reviewed here. *Goldman v.*

United States, 316 U. S. 129, 135; cf. *United States v. Johnson*, 319 U. S. 503, 518; *Delaney v. United States*, 263 U. S. 586, 589-590. They make it abundantly clear that the questions suggested by the petition are academic, without actual relationship to the present record. Those questions happen to be without any substantive merit,^a though that is now beside the point. But it may be noted in leaving this aspect of the case that, considering all the circumstances, petitioners' reference to their April 25 letters as "confessions, unique for frankness and completeness" (Pet. 27), involves not so much hyperbole as irony.

^a Even if petitioners had made full disclosure, it is clear, as charged by the trial court, that prosecution would not be foreclosed. *Whiskey Cases*, 99 U. S. 594; *United States v. Blaisdell*, 3 Ben. 132, Fed. Case No. 14,608 (S. D. N. Y.); cf. *Gladstone v. United States*, 248 Fed. 117 (C. C. A. 9), certiorari denied, 247 U. S. 521; *United States v. McCormick*, 67 F. 2d 867 (C. C. A. 2), certiorari denied, 291 U. S. 662. The most authoritative formulation of the voluntary disclosure policy merely implies a self-imposed administrative limitation by the Treasury Department not to refer cases to the Department of Justice for prosecution. Actually, it would seem that there would be nothing to prevent an indictment without referral. Cf. *United States v. Morgan*, 222 U. S. 274. Here there is no suggestion that the Department of Justice effected a compromise after indictment, see Executive Order No. 6166 (*supra*, pp. 3-4), and the suggestion that there was any earlier compromise by the Treasury Department under Section 3761 of the Internal Revenue Code (*supra*, pp. 2-3), was correctly characterized by the court below as "illusory" (R. 2199), on the authority of *Botany Mills v. United States*, 278 U. S. 282.

2. Petitioners insist (Pet. 17, 23-29) that their constitutional rights were violated because the district court itself determined as a fact whether the disclosure preceded the investigation and was made under a promise of immunity, and did not submit that question to the jury. The contention is untenable, for a number of reasons.

(a) It is firmly settled that the determination of preliminary questions of fact in connection with the admissibility of evidence is within the exclusive province of the trial judge. *Ford v. United States*, 273 U. S. 593, 605; *Steele v. United States*, 267 U. S. 505; *Gila Valley Ry. Co. v. Hall*, 232 U. S. 94, 103; see *Nardone v. United States*, 308 U. S. 338, 341. His determination will not be reviewed here after it has been concurred in on appeal (see *Goldman v. United States*, 316 U. S. 129, 135), particularly when, as in this case, it is so clearly supported by the evidence.

(b) The evidence in question consisted, not of personal records of the present petitioners, but of the books, records, and papers of corporations which were not defendants in the criminal prosecution. This evidence could have been obtained through the use of legal process, independently of any proffer on petitioners' part, and could have been used against them regardless of their consent or objection. Internal Revenue Code, Sec. 3614 (26 U. S. C. 3614); cf. *Cooper v. United States*,

9 F. 2d 216 (C. C. A. 8). Consequently the discussion throughout the petition of principles governing individual confessions is wide of the mark. Moreover, the cases relied upon as establishing a conflict, in this Court⁴ and in other circuits,⁵ are not in any sense inconsistent with the decision below.

(c) Finally, the trial judge here did not foreclose the jury's consideration of the issue of voluntary disclosure. He explicitly enjoined the jury to consider all of the transactions touching the alleged disclosure for the purpose of determining whether in view thereof the petitioners had the requisite intent to commit the crimes charged. With particular reference to the filing of returns in 1945, practically contemporaneously

⁴ *Lyons v. Oklahoma*, 322 U. S. 596, and *Lisenba v. California*, 314 U. S. 219, were appeals from state courts; there, under the local practice involved, juries were required to pass upon the admissibility of confessions already admitted by the trial judge. *Wilson v. United States*, 162 U. S. 613, as the court below noted (R. 2199), contains at the most a dictum that the question of the admissibility of a confession may (not must) be submitted to a jury.

⁵ *Cohen v. United States*, 291 Fed. 368 (C. C. A. 7), simply holds that the trial judge must make a preliminary determination of the voluntariness of an individual confession before submitting it to the jury; there it was submitted without any such determination. *McAffee v. United States*, 105 F. 2d 21 (App. D. C.), and *Denny v. United States*, 151 F. 2d 828 (C. C. A. 4), discuss the instructions to be given a jury as to the probative value of an individual confession already admitted in evidence following the judge's preliminary determination.

with the alleged disclosure, the court charged (R. 1872):

A man can't intend to defraud and at the same time have an honest intention to disclose past irregularities in connection with income taxes. At least I don't think so.

Further, the jury was not restricted in its weighing of the "disclosure" testimony to the offenses committed in 1945. They were given unusual latitude to go "so far back as you may care to go or as far ahead as you may care to go, on these returns that they filed within or reasonably near that period" (R. 1873). Under the charge given, it would seem reasonable to assume that if the jury believed that petitioners entertained an honest intent to make voluntary disclosure of their past frauds, the jury would have acquitted at least on count fourteen (R. 35-37), charging tax evasion on February 15, 1945, and on counts five (R. 18-20) and twenty-two (R. 51-53), which charged tax evasion on March 15, 1945.

3. It seems appropriate to note that petitioners do not question here (Pet. 6), nor did they below (R. 2195), that there was a willful attempt on their part to evade the payment of taxes and a conspiracy to accomplish that result.

CONCLUSION

The decision below is obviously correct, there is no conflict of decisions, and the questions sought to be raised by the petition for a writ of certiorari

are never reached on the present record. The petition should therefore be denied.

Respectfully submitted.

✓ PHILIP B. PERLMAN,
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THERON LAMAR CAUDLE,
Assistant Attorney General.

✓
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SEPTEMBER 1947.

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1947

IN THE

Supreme Court of the United States

OCTOBER TERM, 1947

No. 279

HENRY LUSTIG, E. ALLAN LUSTIG and JOSEPH SOBEL,
Petitioners,

v.

UNITED STATES OF AMERICA.

**PETITION FOR REHEARING
OF PETITION FOR A WRIT OF CERTIORARI**

NATHAN L. MILLER,
J. BERTRAM WEGMAN,
Attorneys for Petitioners.

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**PETITION FOR REHEARING
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TO THE HONORABLE, THE CHIEF JUSTICE OF THE UNITED STATES AND THE ASSOCIATE JUSTICES OF THE SUPREME COURT OF THE UNITED STATES:

Now come Henry Lustig, E. Allan Lustig and Joseph Sobel, the petitioners above named, and pray that this Court may reconsider the denial of a writ of certiorari herein.

Your petitioners fear that two grave questions of the utmost public importance escaped the notice of the Court because counsel did not present them with sufficient clarity and conciseness.

Those questions are:

1. *Whether the United States Treasury Department has the power without agreement in writing to grant immunity from criminal prosecution to delinquent taxpayers who make voluntary disclosure before investigation, which power it has heretofore uninterruptedly exercised without question or challenge for more than twenty years.*

In the opinion below, the Circuit Court of Appeals squarely decided that the Treasury Department had no power to grant such immunity except by the execution of a formal written agreement of compromise, and that since there was no written agreement in the case at bar "there is no merit in the defense of immunity" (R. 2199-2200).

The District Court had on this ground withdrawn from the consideration of the jury the disputed question of fact whether the petitioners had made a voluntary disclosure before investigation in reliance upon an unequivocal promise of immunity (R. 1864-1869); and had submitted to the jury as the sole issue in the case the undisputed question whether false tax returns had been filed with intent to defraud the revenue.

After the trial the District Court decided that disputed question of fact, on a reserved motion, and the Circuit Court of Appeals accepted the Trial Court's findings of fact as depending "upon conflicting testimony or inferences therefrom" (R. 2200-2201).

Neither of the Courts below held or even suggested that the disputed question was not a question of fact, and in its answer to the petition for a writ of certiorari the Government attacked the credibility of witnesses. The Government has never claimed that disputes of fact on which a claim of immunity from criminal prosecution depends are not questions for the jury. Here the jury was expressly forbidden to consider those questions.

2. Whether on the constitutional questions of due process and self-incrimination, arising under the Fifth Amendment, there should ultimately have been submitted to the jury the disputed question of fact whether the petitioners' confession was induced by the Treasury Department's promise of immunity.

The record discloses that the Circuit Court of Appeals squarely decided that that question was "one of admissibility of evidence" to be finally decided by the Court (R.

2198) and that what this Court said in *Wilson v. United States* (162 U. S. 613, 624) was *dictum* (R. 2198).

The first question stated above has never been decided by this Court.

If the many observations of this Court indicating that the second question was a question for the jury were *dicta*, or apply only to trials in State Courts, the second question has never authoritatively been decided by this Court. The decision below on this question conflicts with the decisions of other Circuit Courts of Appeals, which have held that if there is a conflict of evidence whether a confession is involuntary, that question should ultimately be submitted to a jury under proper instructions by the Court. Thus there is uncertainty upon a vital and important principle of constitutional law.

WHEREFORE, your petitioners most humbly and respectfully pray this Court to reconsider the denial of a writ of certiorari herein and to grant them a hearing on the merits of those two questions.

The undersigned counsel for the petitioners certify that this petition for rehearing is presented in good faith and in the sincere belief that it has merit; and that it is not presented for the purpose of delay.

Respectfully submitted,

HENRY LUSTIG, E. ALLAN LUSTIG and
JOSEPH SOBEL,

Petitioners,

by

NATHAN L. MILLER,

J. BERTRAM WEGMAN,

Attorneys for Petitioners.